JD(SF)-22-03
Portland, OR

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

FRED MEYER, INC.

and Case 19-CA-28236

UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION,
LOCAL 367, AFL-CIO

Eddie E. Clopton, Jr., Esq., Seattle, WA,
for the General Counsel
Jacqueline Damm, Esq., of Bullard, Smith,
Jernstedt & Wilson, Portland Oregon,
for the Respondent
Finley Young, Esq., United Food &
Commercial Workers Union, Lakewood,
WA, for the Union
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DECISION

Statement of the Case

Gerald A. Wacknov, Administrative Law Judge: Pursuant to notice a hearing in this matter was held before me in Seattle, Washington, on January 23, 2003. The charge was filed by United Food and Commercial Workers International Union, Local No. 376, AFL-CIO, on September 25, 2002. On November 27, 2002, the Acting Regional Director for Region 19 of the National Labor Relations Board (Board) issued a Consolidated Complaint and Notice of Hearing alleging violations by Fred Meyer, Inc. (Respondent) of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (Act).[1] The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. At the close of the hearing the General Counsel orally argued the case, and since the close of the hearing a brief has been received from counsel for the Respondent. Upon the entire record, and based upon my observation of the witnesses and consideration of the argument and brief submitted, I make the following:

[1] The parties settled one of the cases (Case 19-CA-28231) prior to the hearing, and on January 15, 2003, this case was severed from the complaint.

Findings of Fact

I. Jurisdiction

The Respondent is a Delaware corporation with an office and place of business located in Portland, Oregon, where it is engaged in the business of retail sale of groceries and non-food items. In the course and conduct of its business operations the Respondent annually derives revenues in excess of $500,000 and purchases and receives goods valued in excess of $5,000, which originate outside the State of Oregon. It is admitted and I find that the Respondent is, and at al material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. Alleged Unfair Labor Practices

A. Issues

The principal issue in this proceeding is whether the Respondent has violated Section 8(a)(1) and (5) of the Act by failing to timely furnish the Union with requested information.

B. Facts

The facts are not in material dispute. The Respondent operates retail grocery and general merchandise stores throughout the Northwestern United States, and also operates jewelry stores throughout the United States. It employs approximately 35,000 employees. About half of these employees are represented by various labor organizations. Cindy Thornton, Vice President, Employee Relations, who maintains her office at the Respondent's headquarters in Portland, Oregon, is responsible for the employee relations of all the union and non-union employees. The union employees are covered by grievance procedures in various union contracts, and the non-union employees may present grievances through a complaint resolution procedure established by the Respondent. All such matters are handled by Thornton or her subordinates, called employee relations administrators. If a grievance goes beyond the first step, it is transferred to and handled by Allied Employers, Inc., an employer association. Thornton testified that in 2001 about 450 new grievances were received in her department, and in 2002 eight hundred grievances were received.

The Union has a contract with the Respondent covering employees at various stores. By letter dated July 24, 2002, [2] a grievance was sent in by Gary Anderson, Union Representative, headed: "Patty Smith—Fred Meyer AG Write-up for Customer Complaint" (Patty Smith grievance). This grievance, in the form of a brief letter, sets forth the nature of the matter, namely that Patty Smith received a write-up because of an alleged customer complaint, and also received an unfavorable evaluation by the store manager. The letter also states, "The Union is requesting a copy of the customer complaint letter you received," and also, "Please provide us with any discipline(s) Ms. Smith received in the last 60 days."

[2] All dates or time periods hereinafter are within 2002 unless otherwise specified.

The Union acknowledges that the Patty Smith grievance letter was not sent to the correct individual. Rather than to Thornton, it was sent to Carl Wojciechowski, Group Vice President of Human Resources, who is Thornton's superior. Normally this is not a problem, as such mail is then redirected to the correct individual. However, for an unknown reason, the grievance was either not received by Thornton or the subordinates in her department, or was misplaced and, according to Thornton, "got lost." Accordingly, it was not logged in and the Respondent had no record of it.

In late 2001 Thornton began having a difficult time retaining and/or hiring and/or training personnel in her department, and since about early 2002 grievances were being filed in record numbers. Thornton and her limited staff were exceedingly busy, and could not keep current with the large volume of grievances. As noted above, Thornton dealt with many unions in addition to the Union herein, and had advised all of the union representatives of her predicament. Thus, she had notified them that until the personnel situation could be stabilized and the backlog could be reduced, she was prioritizing the grievances, and that grievances involving discharges, layoffs or suspensions were being given priority over less serious disciplinary matters. She also advised the union representatives that if there was some matter of importance or urgency that required immediate attention, they should simply phone her, as this would expedite the process. Specifically, she advised Finley Young, the Union's Grievance Director and Staff Attorney, of all these things.

As the Patty Smith grievance had never been received and/or logged in, the Respondent did not reply to the Union's July 24 grievance and/or information request. Accordingly, on August 6, Union Representative Gary Anderson sent a follow-up letter, this time correctly addressed to Thornton, stating that the Patty Smith grievance had been mailed on July 24, and that the Union had not received an answer or response. This letter does not reference the prior request for information that was contained in the grievance letter.

Thornton testified that upon receiving such a follow-up letter she would customarily instruct one of the administrators to handle the matter by locating the grievance and, if the administrator was unable to find the grievance, to advise the union that no grievance had been received. However, given the aforementioned general office situation at the time, and the fact that priority was being accorded to discharge and suspension grievances, it appears that the Union's follow up letter regarding a non-existent grievance alleging an improper "write-up" of an employee was not considered to be of immediate priority. Receiving no response, Anderson thereupon referred the matter to Young, who supervises the union representatives in their filing and processing of grievances.

On August 23, Young faxed a copy of the original grievance, the follow-up letter, and an unfiled NLRB charge form to Thornton, notifying her that Young intended to file a charge with the Board for failure "to provide information regarding the discipline grievance" filed by the Union unless a response to the grievance was received by August 28. Thornton, who was out of town on business during this period, did not see these documents.

Next, Young phoned Thornton on August 29, leaving a message on her voicemail. He stated that he intended to file a Board charge if he did not receive a response to the grievance. Thornton did return his phone call the next day, August 30, leaving a message on Young's voicemail. Thornton replied that she would promptly fax him a response to the grievance. She did so as follows:

Re: Patty Smith - Fred Meyer AG Write-up for Customer Complaint

Dear Mr. Young:

This letter is a follow-up to my phone mail message I left for you today August 30, 2002 when you were out of the office.

As I explained to you in my phone mail message, I was out of the office in mediation on Thursday when you called me about this matter. I do want to express my appreciation of you giving me a phone call prior to filing an Unfair Labor Practice Charge on this matter. However, as I indicated in my phone mail message to you we did not receive copy's (sic) on this as is the normal course of procedure in grievance matters. Therefore, filling a ULP would be inappropriate.

Our answer to this grievance is that the written warning was part of progressive discipline and warranted in this matter. Her grievance of this matter will be noted in her file. However we do not see a violation of the Contract by issuing a written warning as part of progressive discipline. Therefore the grievance is denied.

If I can be of further assistance, please advise.

Regarding this letter, Thornton testified that she understood Young to be requesting an immediate response to the "grievance," and did not understand that he was also requesting that the related information request be acted upon immediately. August 30 was Thornton's last day of work prior to a three-week vacation. She returned to work on September 23.

Young did not attempt to phone Thornton to advise her that, in addition to the Respondent's reply that the grievance was being denied, he was also awaiting the requested information. Rather, on September 5, Young responded to Thornton's letter in writing as follows:

There are several outstanding issues with regard to the above-referenced grievance. First of all, if you did not get the indicated copy of the original grievance letter, I apologize. However, I note that it was originally and mistakenly copied to Carl Wojciechowski instead of yourself, and I wonder if that is not behind your failure to get the letter rather than a failure to send it. Regardless of that, you do now have the grievance, and you will note two information requests as yet unfilled: (1) a copy of any discipline received by the grievant 60 days prior to the warning notice and; (2) a copy of the customer complaint on which the warning notice was based. Because this information is necessary for us to evaluate the validity of the warning notice, we believe it is our right under the National Labor Relations Act to have this information. Please furnish it by September 16, 2002. Failing in which, we will take the matter to the National Labor Relations Board.

Thornton returned from vacation on September 23. Upon her return she began attending to a large volume of mail, emails and voicemails that had accumulated during her vacation; she does not recall seeing the September 5 letter from Young. Young, receiving no response from Thornton, filed the instant charge on September 25.

On October 4, Thornton sent the following letter to Young:

> I located the aforementioned grievance, which was copied to Carl Wojciechowski instead of me. Pursuant to the request in that grievance, please find enclosed written warnings from February 18, 2002 through July 21, 2002 along with the customer complaint she received on June 26, 2002, and a copy of her yearly evaluation.
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> I want to once again express my disappointment in the UFCW 367's new policy to automatically file unfair labor practice charges on grievances that are not answered in your unilaterally set timeframes. A simple phone call from you to me would have remedied this situation easily. Since the information has been provided as requested, I would ask that you withdraw the unfair labor practice charge that you filed. If you wish to pursue the grievance further, please contact Allied Employers to arrange for the processing of this grievance.

Upon receiving the requested information the Union decided not to pursue the Patty Smith grievance.

Thornton testified that prior to leaving on vacation she prepared a voicemail message letting callers know she was on vacation and would not be responding to their calls, and advising them to contact one of the employee relations administrators in her absence. Thus, Young would have known she was on vacation if he had phoned her, and could have spoken to one of the administrators or to Wojciechowski in her absence.

Thornton was upset that Young had filed the unfair labor practice charge, as such charges added to the "overwhelming" workload. Further, she believed they had had an understanding about these things. Thus, she had had several prior conversations with Young about this general procedure, and Young had agreed that he would phone her before he filed Board charges. Thornton testified that while Young acknowledged that a phone call would be more beneficial than sending follow-up letters, nevertheless Young explained that it was the Union's policy to make the follow-up request in writing. Thornton said this was fine and she understood the Union had its own procedure, but nevertheless it would be helpful if he would call her. He said fine. She had made this request of other union representatives as well, advising them to phone her if they were getting pressure from their constituents and needed something right away. According to Thornton, this arrangement with Young and the other representatives was helpful and "it helped us from getting lost in paperwork, until we got on our feet."

Thornton called Young after she received the September 25 charge and, reminding him of their understanding, asked why he did not call her. Young agreed that they had an understanding, and went on to say, "…I forgot to tell you we have changed that now. We cannot do that any longer…" Thornton asked what he meant and whether he was prohibited from calling her. Young said yes, he was prohibited from calling her, "that he had gotten direction from his boss that they were to file the grievance, do the follow-up letter and then, send the threatening Charge letter and then, file the Charge" instead of calling first. Thornton said that if he had just called and requested the information before she went on vacation she would have contacted the store where Patty Smith worked and would have faxed over the information he wanted.

Currently Thornton not only has a full complement of employee relations administrators, but she has also hired an administrative assistant who logs in grievances, assigns them, and performs other administrative duties. This has enabled the employee relations administrators to spend all of their time handling grievances rather than performing related administrative functions.

C. Analysis and Conclusions

The Respondent readily agrees that the information requested by the Union was necessary and relevant, and has furnished the information. While the record contains assertions that the Respondent was not diligent in responding to other grievances, this case involves only the manner in which the Patty Smith grievance was handled. Whether or not the Respondent was diligent in responding to other specific grievances was not litigated, and there are no complaint allegations regarding the Respondent's handling of such grievances either individually or collectively.

The unrebutted record evidence shows, and I find, that Thornton's department had experienced personnel problems that could not have been anticipated, and that these problems, coupled with the simultaneous and dramatic increase of some 400 grievance filings over the prior year's filings, resulted in a large backlog of grievances. Thornton did what seemed most appropriate under the circumstances: she prioritized the grievances and attempted to process them in the most expedient manner possible, and simultaneously attempted to hire and/or train a full complement of employee relations administrators. There is no evidence that Young or any other union representative was unwilling to acknowledge or accommodate her difficult situation.

Thornton advised union representatives of her dilemma, and told them to simply call her if there was something that required immediate attention. Young agreed to do this. Thornton was operating on the mutual understanding that, I find, did in fact exist between the two of them. There is no evidence that Thornton did not mean what she said. Indeed, when Young did phone her on August 29, she promptly responded the following day, by phone, fax and mail, and provided him with what she understood he was seeking, namely the Respondent's position on the Patty Smith grievance. Had Young called at any time prior to August 29, it is reasonable to assume that he would have received the information forthwith. And had he called after August 30, while Thornton was on vacation, it is reasonable to assume that his request would have been given immediate attention by one of the employee relations administrators in Thornton's absence. Apparently because of instructions from his superior, he did not make any such phone call.

From the foregoing it is clear that the Respondent was making a good faith attempt to process grievances in the most expedient manner under the circumstances, and that the Union would have received the requested information in a timely fashion if Young had done what he had agreed to do, namely, make a phone call.

The complaint is dismissed in its entirety.

Conclusions of Law

1. Fred Meyer, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law, I issue the following recommended:

ORDER[3]

The complaint is dismissed in its entirety**.**

Date: March 14, 2003

Gerald A. Wacknov
Administrative Law Judge

[3] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.